

## **Automatic Stay - Rental Deposits**

### **11 U.S.C. § 362(l)(1)**

*This section creates an exception to the automatic stay provisions regarding leases, as well as limitations to this new exception and remedial actions available to both the debtor and the landlord. This exception to the automatic stay applies to any eviction or similar proceeding against a debtor tenant if the landlord has obtained a judgment for possession of the residential leasehold prior to the date of the filing of the petition.*

The petition must indicate whether pre-petition judgment for possession of a residential leasehold has been issued (at the bottom of page 2 of Official Form 1) and may assert that a right to cure is available under state law. The debtor must deposit, with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

#### **Courts have chosen different options for addressing this requirement, including: <sup>1</sup>**

In each of the options noted below, it is assumed that the debtor files the petition asserting the right to cure and the existence of a pre-petition judgment of eviction. The debtor also files with the clerk a certified or cashier's check or money order made payable to the lessor, with a copy of the judgment of eviction.

#### **Option 1:**

- The clerk's office logs<sup>2</sup> the check and either images it or makes a hard copy.
- The clerk's office confirms that the check is made payable to the party listed on the petition and then immediately transmits (e.g., by mail, certified with return receipt requested) check to the lessor.<sup>3</sup>

#### **Option 2:**

- The clerk's office logs the check and makes a hard copy of the check or images it. The clerk's office places the check in safe pending further order of the court.

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<sup>1</sup> These options have been approved in principle by the Accounting Division of the Administrative Office. Courts needing advice on a particular procedure should contact the Accounting Division.

<sup>2</sup> With respect to the log for checks, clerks should follow audit procedures and ensure that there is a segregation of duties and a complete audit trail for the check. For example, the check should be mailed by a person other than the clerk who received the check, and the log should include a column for "date mailed" and "by whom mailed."

<sup>3</sup> The check should be mailed to the lessor at the address listed on the debtor's certification or the petition. The debtor is required to include the lessor's name and address in the certification on Official Form 1.

- The clerk's office sends notice to lessor with option for lessor to either,<sup>4</sup> within the time designated by the court:
  - consent to receive the check (lessor will give payment instructions, i.e. mail check to lessor or lessor's representative/attorney), or
  - object to the debtor's certification. A hearing will then be set to address the lessor's objection.

### **Option 3:<sup>5</sup>**

In instances where the court requires the debtor make the check payable to the court:

- The clerk deposits check into the Deposit Fund (fund code 6855TT). The court can then either:
  - Complete a payment voucher in FAST or FINSYS requesting that the district court clerk issue a check payable to the lessor (as provided by the debtor and listed on the judgment),<sup>6</sup> or
- Follow the notice procedures set out in Option 2, above.

### **Debtor's Required Certifications**

Pursuant to 11 U.S.C. § 362(l)(1), the debtor must file with the petition and serve upon the lessor a certification under penalty of perjury. The debtor can satisfy this obligation by either:

- filing and serving on the lessor the first required certification indicating that:
  - a pre-petition judgment of eviction was obtained and that the debtor would be permitted to cure the entire monetary default which gave rise to the judgment for possession; and
  - the debtor has deposited with the clerk of the court, any rent that would become due during the 30-day after the filing of the bankruptcy petition.

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<sup>4</sup> On suggestion is for the notice to include a statement that if the lessor does not respond within the deadline set by the court, the court will deem the lack of response as acceptance and will send the check to the lessor at the address set forth in the debtor's certification.

<sup>5</sup> Courts considering which process to implement should be aware that this approach has drawbacks. For example, under this procedure, the clerk must certify to the district court that payment to the lessor is "legal, proper and correct," so certifying officer liability may be implicated. In addition, in order to ensure that the check is paid to the proper person, the clerk would need to require the debtor to include the lessor's social security number or employer identification number.

<sup>6</sup> Courts may locally decide to require an order of the court before the funds can be transmitted. However, the Office of General Counsel has opined that a court order is not required for the clerk to disburse the rent deposits received under 11 U.S.C. § 362(l)(1)(B).

The debtor must file with the court the proof of service of this certification.

- The debtor also may satisfy the requirements of 11 U.S.C. § 362(l)(1) by completing all three check boxes listed on Official Form 1 under the section entitled “Statement by a Debtor who Resides as a Tenant of Residential Property.” The debtor must serve a copy of the petition on the lessor and file proof of service with the court.

Section 362 (l)(2) of the Bankruptcy Code requires that within 30 days of filing of the petition, the debtor must file with the court and serve on the lessor a second certification indicating that the debtor has cured, under applicable non-bankruptcy law, the entire pre-petition monetary default.

If the lessor files an objection to either certification, the court must hold a hearing within 10 days of the filing and service of the objection, to determine the veracity of the certification(s). If the court upholds the lessor’s objection, the clerk must immediately serve a certified copy <sup>7</sup>of the court’s order on the lessor and the debtor.<sup>8</sup>

If the debtor fails to file either certification, the clerk must “immediately” serve on the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under 11 U.S.C. §362(b)(22). If the debtor indicates on the petition that a judgment has been obtained but fails to either indicate that debtor would be permitted to cure the entire monetary default which gave rise to the judgment for possession or deposit with the clerk any rent that would become due during the 30-day period subsequent to the filing of the bankruptcy petition, then the court would follow the procedure outlined above.

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<sup>7</sup> Although there is normally a charge for certifications, no charge should be imposed in this instance, as the certification is required by statute, not at the request of a party.

<sup>8</sup> The Bankruptcy Reform Working Group is of the opinion that “serve” in these provisions means “give notice of” – the court does not effect service in the same manner as parties. In addition, although the copy must be certified, the clerk should not impose a fee for the certification, as it is not on request of the debtor, but rather, is completed pursuant to the statute.